Supreme Court U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELLEN AUDET AS NATURAL MOTHER, GUARDIAN AND NEXT BEST FRIEND OF ASHLEY AUDET, A MINOR,

Petitioner,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are punitive damages available under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, when an ERISA-governed health maintenance organization (HMO) alters a medical report recommending treatment and, under egregious, unjustifiable and possibly fraudulent circumstances, uses it to deny life-sustaining medical care for a child?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ellen Audet as natural mother, guardian and next best friend of Ashley Audet, a minor, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeal for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported but is included in the appendix in its entirety. The opinion of the United States District Court, Southern District of Florida is not reported but also is included in the appendix in its entirety.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 27, 1998. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 10(a). The United States Court of Appeals for the Eleventh Circuit has decided an important federal question in a way that conflicts with an opinion of a state court of last resort: *Weems v. Jefferson-Pilot Life Insurance Company, Inc.*, 663 So.2d 905 (Ala. 1995), *cert. denied*, 516 U.S. 971, 116 S.Ct. 434, 133 L.Ed.2d 348 (1995).

There was no petition for rehearing. However, when Ellen Audet filled her initial brief in the United States Court of Appeal for the Eleventh Circuit she also filed a Suggestion of Hearing *En Banc* pursuant to the rules of that court. That

request was denied on October 26, 1998, before that court issued its opinion on the merits.

THE FEDERAL STATUTE INVOLVED IN THIS CASE

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a) provides in relevant part:

> A civil action may be brought--
> (1) by a participant or beneficiary--
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> . . . .
> (3) by a participant, or beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

A. The Proceedings Below:

Ellen Audet brought this claim on behalf of her twelve year old daughter, Ashley Audet, in state court in Florida on May 1, 1996. Prudential removed the law suit to the United States District Court, Southern District of Florida as this

matter is governed by Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. On March 14, 1997, Ellen Audet sought leave of court to plead punitive damages. That motion was denied. Later, Ellen Audet again asked the District Court for leave to assert similar punitive relief based upon discovery of evidence that Prudential, through its agents, had altered medical records of Ashley in order to create a record upon which they could justify a denial of ERISA benefits and life-sustaining health care. That request to amend was also denied. The matter was tried non-jury and judgment was entered in favor of Audet on December 23, 1997 for the full amount of Ashley's medical bills. The district court found that Prudential's "denial of benefits was an abuse of the administrator's discretion" and that "under all of the facts considered in this case, it was arbitrary and capricious to deny the professional chest physiotherapy benefits to the insured." On January 22, 1998, Plaintiff filed a Notice of Appeal specifically addressed to the denial of leave of court to plead punitive damages and to allow a jury trial. On November 27, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's orders and judgment.

B. Statement of the Facts:

The District Court made the following findings of fact relevant to this petition which are taken almost verbatim from the Findings of Fact and Conclusions of Law issued by the District Court:

1. Chest Physiotherapy and the ERISA HMO Plan:

Ashley Audet, a minor suffering from cystic fibrosis, was insured through her mother's Health Maintenance Organization (HMO) employment plan, The Prudential Health Care Plan, Inc. The insurance policy in question was part of an employee welfare benefit plan covered under ERISA. There was also no dispute that chest physiotherapy was administered to Ashley Audet to loosen the secretions that her cystic fibrosis causes to accumulate in her lungs. Likewise, there was no dispute as to the qualifications of the chest physiotherapist or as to the reasonableness of the amount of the bills for the treatment between May 29 and September 1, 1995. The plan had denied the benefits to the insured under the exclusion for "custodial care" that may be provided by a non-professional. In other words, according to Prudential, Ashley Audet's cystic fibrosis was not sufficiently aggravated to require a professional therapist and the type of chest physiotherapy that needed to be performed could be done by a lay individual with minimal training. Therefore, Prudential declined to award the benefits.

Although a lay person may supplement that chest physiotherapy and, in fact, Ashley's mother provided such therapy for a long period of time, the District Court found that Ashley's health condition required the services of professional chest physiotherapists. The District Court also found that in order to provide the type of chest physiotherapy that was necessary to expel the secretions from the lungs, sufficient training was necessary. The District Court found that Ashley Audet's claims for chest physiotherapy treatment by a licensed professional respiratory therapist were

reasonable and medically required because of her cystic fibrosis.

2. The HMO's Review of the Request for Treatment:

Prudential, through Nancy Murphy, testified that no case manager had been assigned to Ashley Audet's case and it was obvious that an insufficient number of case managers existed (only one!) to handle the 100,000 subscribers. More importantly, Ms. Murphy's recommendation to Prudential's medical director, Dr. Melvyn Fletcher, that the benefits should be denied was made without Ms. Murphy possessing sufficient knowledge regarding chest physiotherapy or the severity of Ashley Audet's cystic fibrosis. Ms. Murphy's opinion clearly contradicted the prescription by Dr. Birriel, the patient's own physician.

3. Alteration of Medical Records:

Although the District Court refrained to take evidence specific to punitive damages, sufficient facts already exist in the record to infer that punitive damages would be justified in this case. The issues raised in this petition are purely legal in nature. If this Court were to allow a claim for punitive damages, Audet acknowledges that the facts for such a claim must be fully developed at the trial level. Nonetheless, Audet provides the Court with the following facts already in the record to show that the question presented is more than an academic inquiry:

Before denying care to Ashley Audet, Prudential sent a respiratory therapist to Ashley's home to examine her and

render an opinion on the need for therapy. That licensed therapist, Karen Heins, was employed by Home Care Medical, Inc., a company with which Prudential contracted for various services. Heins examined Ashley and wrote a report stating that the therapy for Ashley was necessary and that it was needed five times per week by a professional therapist. The full text of the original report of Karen Heins was attached by the District Court as an exhibit to the Court's Findings of Fact and Conclusions of Law." (See Appendix).

It can be fairly inferred that Prudential participated in altering medical records to justify denying care for Ashley. After receiving Karen Heins' report, Prudential's nurse, Nancy Murphy, called Heins' superior, Tony Cataldi, Jr. After that telephone call, the altered report appeared in Ashley's medical records at Prudential. The therapist who visited Ashely and authored the original report, Karen Heins, testified that she did not make the changes and that she was unaware of the changes to her report until shortly before she was deposed in this case. Tony Cataldi, Jr., who is the owner of Home Care Medical, admitted that after his telephone call with Nancy Murphy, he altered the document without telling Heins or having any further evaluation of Ashley. It can be fairly inferred from the results of the Murphy-Cataldi telephone call that Murphy, acting as an agent of Prudential, requested that Cataldi alter Heins' evaluation of Ashley Audet or at least participated in the alteration enough so that Prudential could have a record to justify denying Ashley therapy. The full text of the altered report was also attached by the District Court as an Exhibit to the Court's Findings of Fact and Conclusions of Law." (See Appendix). The altered report went to Prudential's medical director who used it to

deny therapy for Ashley. Heins' original report did not go to the medical director.

REASONS FOR GRANTING THE WRIT

I. The Conflict:

The decision of the United States Court of Appeals for the Eleventh Circuit in this matter directly conflicts with a decision of the Supreme Court of Alabama. *Weems v. Jefferson-Pilot Life Insurance Company, Inc.*, 663 So.2d 905, 912 (Ala. 1995), *cert. denied*, 516 U.S. 971, 116 S.Ct. 434, 133 L.Ed.2d 348 (1995). It also conflicts directly with the plain language of this Court's opinion in *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 111 S.Ct. 487, 112 L.Ed.2d 474 (1990). The *Weems* decision was based almost entirely upon this Court's opinion in *Ingersoll-Rand*. The Supreme Court of Alabama stated: "The Supreme Court, in *Ingersoll-Rand*, has now specifically held that the courts are authorized to award damages, both extra contractual, and even punitive, where the facts support them, though they are not specifically provided for in ERISA." *Weems v. Jefferson-Pilot Life Insurance Company, Inc.*, 663 So.2d 905, 912 (Ala. 1995) (citing: *Haywood v. Russell Corp.*, 584 So.2d 1291 (Ala. 1991)). That conclusion of the Alabama court was drawn from Justice O'Connor's majority opinion in which she wrote: "It is clear that the relief requested here is well within the power of the federal courts to provide." *Ingersoll-Rand Company v. McClendon*, 498 U.S. at 145. The relief requested by Mr. McClendon in that case included: "lost future wages, mental anguish and **punitive damages** as a result of [a] wrongful discharge." *Ingersoll-Rand v. McClendon*, 498 U.S. at 136 (emphasis added).

Commenting on these points of Justice O'Connor's opinion, the *Weems* court wrote: "This court can read and understand the English language and believes that the Supreme Court would not say something this important without being careful and deliberate in its choice of words." *Weems*, 663 So.2d 905, 911. In *Weems*, the plaintiff sued Jefferson-Pilot Life Insurance Company for failing to pay hospital charges associated with treating his heart attack after Jefferson-Pilot had certified or otherwise approved the hospitalization. After losing the case in the Supreme Court of Alabama, the ERISA-governed insurer filed a petition for a writ of certiorari with this Court but this Court denied that request. *Jefferson Pilot Life Insurance Company, Inc. v. Weems*, 516 U.S. 971, 116 S.Ct. 434, 133 L.Ed.2d 347 (1995). The two dissenters in *Weems* have relied upon the denial of certiorari as indicative that punitive damages and a jury trial are allowed under ERISA. *Ex parte Metropolitan Life Insurance Company*, 679 So.2d 686, 689 (Ala. 1996). Likewise, United States District Judge William M. Acker of the Northern District of Alabama believes that *Weems* correctly followed this Court's directive, notwithstanding the decisions of the United States Court of Appeals for the Eleventh Circuit. *Anderson v. Metropolitan Life Insurance Company*, 1997 WL 115863 (N.D. Ala. 1997). The Eleventh Circuit has noted a need for this Court to address the issue by pointing out that: "[T]he United States Supreme Court has not conclusively spoken on the issue of whether ERISA § 502(a)(3) encompasses extra-contractual or punitive damages . . . ." *McRae v. Seafares Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991).

The conflict is not confined to the Eleventh Circuit but rather reaches into other United States Courts of Appeals. At

least seven of the Circuit Courts that have spoken on this issue likewise conflict with *Ingersoll-Rand* and the *Weems* holding. *See Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 199 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1512 (1998); *Hemelt v. U.S.*, 122 F.3d 204, 207 (4th Cir. 1997); *Zimmerman v. Sloss Equipment, Inc.*, 72 F.3d 822, 828 (10th Cir. 1995); *Landwehr v. DuPree*, 72 F.3d 726, 735 (9th Cir. 1995); *Medina v. Anthem Life Insurance Company*, 983 F.2d 29, 31 (5th Cir. 1993), *cert. denied*, 510 U.S. 816 (1993); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 506 U.S. 818 (1992); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 286 (2nd Cir.1992).

II. Conflict With Congressional Intent:

The above opinions of the United States Courts of Appeal denying punitive damages also run counter to declared Congressional intent. In 1988, the Education and Labor Committee of the House of Representatives addressed the complications of ERISA preemption when applied to wrongfully denied health insurance claims:

> In recent years, the Committee has received numerous complaints and inquiries from Members of Congress and their constituents about improper denials of medical claims, improper denials of continuation of coverage, or unreasonable delays in processing claims by employers or insurers.

H.R. Rep. No. 801, 100th Cong., 2d Sess. p.2 at 63 (1988).

The Committee considered the concerns of its constituency and the possibility that this Court's decision in *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) would eliminate, by means of preemption, the traditional protections and deterrents that the states have developed to curb insurance company bad faith:

> Participants in ERISA-covered employee benefit plans that have been treated in this manner are concerned that the Supreme Court's interpretation of ERISA . . . as preempting state laws that authorize punitive or other extra-contractual damages in connection with cliams for benefits effectively denies them legal recourse. The Committee shares their concern.

H.R. Rep. No. 801, 100th Cong., 2d Sess. p.2 at 63 (1988).

The Committee concluded, however, that further legislation was not needed because in their view the legislative history on ERISA was already clear. Congress intended the federal courts to shape legal remedies that included punitive damages:

> The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not

> specifically enumerated in Section 502 [29 U.S.C. § 1132] of ERISA. . . . In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, **the Committee intends the federal courts to develop a federal common law of remedies, including (but certainly not limited to) the imposition of punitive damages** on the person responsible for the failure to pay claims in a timely manner.

H.R. Rep. No. 801, 100th Cong., 2d Sess. p.2 at 63 (1988) (emphasis added).

The federal courts recognize that Congress has vested them, and ultimately this Court, with the decision making authority to develop ERISA remedies. *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285 (11th Cir. 1990).

III. The "Dissenting" District Court Judge:

In 1997, United States District Judge William M. Acker of the Norther District of Alabama stated: "[T]he congressional purpose for enacting ERISA has been subverted by judges' narrow construction of ERISA in a way to make realistic or adequate relief for mistreated plan beneficiaries virtually impossible." *Anderson v. Metropolitan Life Insurance Company*, 1997 WL 115863 (N.D. Ala. 1997). After criticizing the bureaucratic "morass" necessary to contest denial of an ERISA health claim, he wrote: "In the

worse case scenario from the participant's point of view, a fiduciary can deny a claim with absolute impunity." *Anderson v. Metropolitan Life Insurance Company*, 1997 WL 115863 (N.D. Ala. 1997). The District Judge had previously read *Ingersoll-Rand* as allowing punitive damages shortly after this Court issued that opinion. In a *sua sponte* opinion reversing his own ruling on a jury trial issue pending before him, he wrote:

> In *Ingersoll-Rand*, the Supreme Court has now clearly answered the Eleventh Circuit's prayer by giving it the "green light" to fashion ERISA remedies beyond the mere enforcement of claims for unpaid benefits, even though a federally fashioned remedy may bear striking similarity to some pre-emptive state or common law remedy. According to *Ingersoll-Rand*, a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extra-contractual, **even punitive damages**, that is if the facts call for such a remedy. . . . . This court did not and could not express the idea as forcefully as Justice O'Connor has now expressed it.

Blue Cross and Blue Shield of Alabama v. Lewis, 753 F.Supp. 345, 347 (N.D. Ala. 1990)(emphasis added).

After *Weems*, Judge Acker saw some hope that the law would provide some recourse to those who are wrongfully denied medical care by their HMOs and health insurers: "The glimpses of hope for beneficiaries that appear in some of the recent cases to which the Alabama Supreme

Court seems to have subscribed, makes this court want to stay around awhile to see what happens." *Anderson v. Metropolitan Life Insurance Company*, 1997 WL 115863 (N.D. Ala. 1997).

IV. The Historical Disincentive to Insurance Bad Faith--Lacking in ERISA:

Notwithstanding its ruling in Ashley Audet's case, the United States Court of Appeals for the Eleventh Circuit has admitted trepidation in applying the restrictions of ERISA to wrongful denials of employee health insurance claims. The court reversed a decision of District Judge Acker but then ended its opinion in *Amos v. Blue Cross Blue Shield of Alabama*, 868 F.2d 430 (11th Cir. 1989) with this near-apology deferring to this Court to chart the course of law on this issue:

> We acknowledge that by eliminating the possibility that insurance companies may be liable for punitive or extra-contractual damages, **the courts are removing a historical disincentive to insurance company misbehavior**. Consequently, our decision may produce unintended results. However, any change in the law's course will have to be charted by the Congress or the Supreme Court.

Amos v. Blue Cross Blue Shield of Alabama, 868 F.2d 430, 433 (11th Cir. 1989) (emphasis added).

Vis-a-vis the HMO and the insured, there is no risk to deny a claim. The ERISA-governed HMO has "an everything-to-win, nothing-to-lose proposition." *See Chaachou v. American Central Insurance Company*, 241 F.2d 889, 893 (5th Cir. 1957) (in the converse circumstance: insurance fraud by consumer requires greater consequence than mere denial of claim).

By contrast, non-ERISA claimants have a punitive damages remedy as a powerful deterrent to wrongful denial of medical health insurance claims. In Alabama, if an ERISA claimant can prevent removal of his claim to federal court, he also has that deterrent. All other ERISA health insurance claimants have no protective disincentive to deter wrongful denial of their claims. The United States Courts of Appeals have created a hole in traditional consumer protections. They depart from the traditional remedies that control insurance company bad faith. Nearly all of the states in the Union have recognized that punitive damages, in one form or another, are necessary to curb wrongful denial of valid insurance claims.[1]

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[1] Punitive damages are a traditional deterrent to curb insurance company bad faith: *See, e.g., Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 689 N.E.2d 1347 (Mass. 1998) (punitive damages are proper under M.G.L.A. c. 93A, § 9(3) where evidence warrants finding of wilful or knowing unfair and deceptive practice); *State Farm Mut. Auto. Ins. Co. v. Brown*, 48 Ark.App. 136, 892 S.W.2d 519 (Ark. 1995) (where insurer improperly failed to pay benefits, a 12 percent penalty was properly awarded pursuant to A.C.A. § 23-89-208); *Steward Title Guaranty Co. v. Aiello*, 911 S.W.2d 463 (Tex. 1995) (upheld award of $200,000 in punitive damages against insurer that breached the duty of good faith and fair dealing); *McLaughlin v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 29

(continued...)

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Cal.Rptr.2d 559, 23 Cal.App.4th 1132 (Cal. 1994) (recoverable damages in suit against insurer alleging bad faith cancellation of policy include punitive damages); *Ballow v. PHICO Ins. Co.*, 878 P.2d 672 (Colo. 1994) (punitive damages may be awarded for bad faith breach of insurance contract, if committed with fraud, malice, or willful and wanton conduct); *Serrin v. Northwestern Nat. Life Ins. Co.*, 2 F.3d 373 (11th Cir. 1993) (punitive damages may be awarded where justified by bad faith failure to pay); *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (N.C. 1993) (punitive damages may be awarded for a bad faith refusal to provide insurance coverage or pay a justifiable claim); *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Ala. 1992) (punitive damages may be awarded for bad faith breach of insurance contract if conduct where malice, bad motive, or reckless indifference is shown); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990) (punitive damages for bad-faith denial of insurance claim requires proof of wanton or wilful misconduct by insurer); *Poling v. Wisconsin Physicians Serv.*, 357 N.W.2d 293 (Wisc. 1984) (injured party may recover punitive damages by showing a wanton, willful or reckless disregard for rights of others); *Trimper v. Nationwide Ins. Co.*, 540 F.Supp. 1188 (S.C. Dist. 1982) (plaintiff could recover punitive damages for wilful or reckless failure to settle or investigate his claim where insurer made no effort to investigate plaintiff's claim); *Johnson v. Pilgrim Mutual Ins. Co.*, 425 A.2d 1119 (Penn. 1980) (punitive damages properly awarded against insurer found to have acted with bad motive in refusing to negotiate in good faith); *Dyer v. General American Life Ins. Co.*, 541 S.W.2d 702 (Mo. 1976) (punitive damages may be awarded where supported by proof that insurer acted maliciously, wilfully, intentionally, or recklessly toward the plaintiff); *see also* A.R.S. § 20-461 (1997); Fla. Stat. § 624.155 (1997); A.C.A. § 23-79-208 (1997); Ca. Ins. § 790.03 *et seq.* (1997); Ga. St. 33-4-6 (1997); K.S.A. §§ 40-2404, 40-2407 (1997); LSA-R.S. 22:1220 (1997); M.G.L.A. c. 93A § 9(3) (1997); M.S.A. § 72A.20 *et seq.* (1997); Mo. St. § 375.420, 375.934, 375.942 (1997); Mt. St. 33-18-233 (1997); Neb.Rev.St. § 44-1529 (1997); Nv. St. 686A.310, 686A.183 (1997); Ny. St. § 2601 *et seq.*, Ny. St. § 109 (1997); 36 Okl. St. 36 § 1250.1 *et seq.* (1997); S.C. St. § 38-59-20 *et seq.* (1997); Tn. St. § 56-7-

(continued...)

This lack of any real deterrent has resulted in rampant abuse by HMOs, managed care and other forms of ERISA health insurance and compels attention from this Court.

V. Consumer Outcry; An Important Federal Question:

In 1995, Americans spent $988 billion on health care. That was 13.6 percent of the Gross Domestic Product. U.S. News and World Report (March 9, 1998). The Kaiser Family Foundation and U.S. News and World Report funded a study of Americans' attitudes toward the health care system and their personal experiences. A poll was conducted by the National Opinion Research Center at the University of Chicago from May 31-July 19, 1997. The survey found that two thirds of Americans have had some problem with the health care system and seventy-five percent were worried about facing problems in the future. Seventy percent were concerned that benefits could be reduced and two thirds of those surveyed were concerned that health care could worsen. Brink, U.S. News & World Report (March 9, 1998).

In October, 1996, the ABA Journal cover story chronicled the ill state of HMO health care. *In Pursuit of Health*, ABA Journal, p. 54, (October, 1996). More recently, U.S. News and World Report magazine featured the ill state of HMO insurance and "managed care" in its March 9, 1998 issue. *What is the Value of a Voice?*," U.S. News and World

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105, 56-7-106 (1997); 8 V.S.A. § 4724 *et seq.* (1997).

Report (March 9, 1998); *HMOs were the right RX, Americans got lower medical costs--but also more worries,* U.S. News and World Report (March 9, 1998). That recent issue included a feature on Doctor Linda Peeno, a former HMO medical director, who cited numerous instances of abuse and questionable tactics. The same medical director, a member of the Roman Catholic Loretto Community, testified before Congress on the state of HMO abuse. The full text of her written testimony submitted to the U.S. House of Representatives Committee on Commerce, Subcommittee on Health and Environment is available on the Internet. L. Peeno, *Managed Care Ethics: The Close View,* <http://www.sepp.net/Peenox.html>.

In 1995, a poll of physicians was conducted by the Boston Herald and WCVB-TV in which they found that 61% of physician specialists agreed with the statement that "In HMO plans, business people decide your health care, not doctors." And, 57% of physician specialists agreed that: "HMO plans prevent doctors from providing needed care in order to save costs." *Do Doctors--or Accountants —Control Your Treatment*, Standard Publishing (Nov. 27, 1995), <http://www.tvrundown.com/hmopoll1.html>.

Complaints like these have found their way into one opinion of a United States Court of Appeal. In *Herdrich v. Pegram*, 154 F.3d 362 (7th Cir. 1997), the court recognized and documented with numerous journal articles that managed care is throwing the medical industry into turmoil. Although the sordid state of affairs should be obvious, the more poignant statements of the court are as follows:

> [W]e are far from alone in our belief that market forces are insufficient to cure the deleterious affects of managed care on the health care industry.
>
> Across the country, health care critics and consumers are complaining that the quality of medical treatment in this nation is rapidly declining, leaving "a fear that the goal of managing care has been replaced by the goal of managing costs." Greene, *Has Managed Care Lost Its Soul? Health Maintenance Organizations Focus More on Finances, Less on Care*, Am. Hosp. Publishing, Inc., May 20, 1997. "An increasing number of Americans believe that dollars are more important than people in the evolving [HMO] system. Whether justified or not, this assumption needs to be taken seriously, according to keepers of the industry's conscience. . . . *Id.*"

Herdrich, 154 F.3d at 374-75.

The Seventh Circuit went on to say:

> The specter of money concerns driving the health care system, says a group of Massachusetts physicians and nurses, "threaten[s] to transform healing from a covenant into a business contract. Canons of commerce are displacing dictates of healing, trampling our profession's most sacred values. Market medicine treats patients as profit

> centers. "*For Our Patients, Not for Profits: A Call to Action*, JAMA, Dec. 3, 1997, at 1773. As one professional stated, "It's too bad. We used to spend most of our time worrying about how to do a better job. Now we worry about doing a better job at a lower price." *Id.*
>
> Thousands of American physicians and nurses, outraged by the increasingly "corporate" nature of American medicine, recently staged a reenactment of the Boston Tea Party by symbolically dumping $1 million each minute into Boston Harbor to dramatize the amount of health care money that is being wasted to pay for HMO marketing, profits, and administrative salaries. *Id.* "The shift to profit-driven care is at a gallop. For nurses and physicians, the space for good work in a bad system rapidly narrows. For the public, who are mostly healthy and use little care, awareness of the degradation of medicine builds slowly; **it is mainly those who are expensively ill who encounter the dark side of market-driven health care.** . . . *Id.*

Herdrich v. Pegram, 154 F.3d 375 (citing: *For Our Patients, Not for Profits: A Call to Action*, at 1773, JAMA, (Dec. 3, 1997)) (emphasis added).

The second-guessing to which doctors are subject by managed care restrictions are frustrating the profession and hence the quality of care being provided:

> In fact, many observers note that **an increasing number of physicians are abandoning the profession because they are disenchanted with the notion of having "medically ignorant administrators" dictate that they limit patient care so as to pad the pockets of the officers of insurance companies and HMO organizations.** [Citing: Krauthammer, *Driving the Best Doctors Away; Physicians are Getting Hammered by Managed Care Micro-management and Malpractice Insurance Premiums*, Wash. Post, Jan. 9, 1998, at A21.] "More than money, this is what is driving these senior doctors crazy: some 24-year-old HMO functionary who knows as much about medicine as he does about cartography demanding to know why Mr. Jones, the diabetic in renal failure, has not been discharged from the hospital yet." *Id.*

Herdrich v. Pegram, 154 F.3d at 376. (emphasis added.)

The court also noted that insurance bureaucrats should not be dictating medical policy:

> We must remember that doctors, not insurance executives, are qualified experts in determining what is the best course of treatment and therapy for their patients. Trained physicians, and them alone, should be allowed to make care-related decisions (with, of course, input from the patient). **Medical**

> **care should not be subject to the whim of the new layer of insurance bureaucracy now dictating the most basic, as well as the important, medical policies and procedures from the boardroom**. If it is, "the cost cutting of managed health organizations and insurers may undermine what is, for now, the best medical care in the world." Beck, "*Drive-by Deliveries" Risky Health Game*, Hous. Chron., Oct. 28, 1995, at 36.

Herdrich v. Pegram, 154 F.3d at 377 (emphasis added).

VI. Altering Medical Records Borders on Criminal:

The extremes of the broad sweeping discretion given to HMOs under ERISA is no more evident than in this case. In Ashley Audet's case, what was done borders on, if not constitutes, a violation of Florida criminal law. It is a criminal offense to alter or falsify medical records:

> (1) Any person who fraudulently alters, defaces, or falsifies any medical record, or causes or procures any of these offenses to be committed, commits a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.
>
> (2) A conviction under subsection (1) is also grounds for restriction, suspension, or termination of license privileges.

§ 395.302 Fla. Stat. (1995).

If an offense rises to meet the statutory definition of a misdemeanor it must certainly be insurance bad faith. When such an offense approaches the level of criminal activity, ERISA should not work to protect the offender from civil accountability.

CONCLUSION

The opinions of the United States Court of Appeals for the Eleventh Circuit and the opinions of the other six Circuits remove a traditional remedy and tested deterrent for insurer bad faith that has become part of the fabric of the insurance law of nearly all the fifty states. Those laws serve to control insurers who over step the bounds of the policies they sell and commit bad faith. The public outcry and HMO abuse illustrated herein shows that managed care can not be allowed under ERISA to deny medically necessary treatment with impunity. The attention of this Court is needed to provide a meaningful disincentive to HMO and insurance company bad faith in ERISA-governed health care.

Respectfully submitted,

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Counsel of Record
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Attorneys for Petitioner

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED NOVEMBER 27, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4127
Non-Argument Calendar

D.C. Docket No. 96-1736-civ-FAM

ELLEN AUDET, as natural mother, guardian and next best friend of Ashley Audet, a minor,

Plaintiff-Appellant,

versus

PRUDENTIAL HEALTH CARE PLAN, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 27, 1998)

Before COX, BLACK and CARNES, Circuit Judges.
PER CURIAM:

Appellant Ellen Audet appeals the district court's refusal to allow her to seek punitive damages and a jury trial in her suit to recover the costs of her daughter Ashley Audet's respiratory therapy treatments from Appellee Prudential Health Care Plan, Inc. Appellant claims that contrary to the district court's ruling, punitive damages are an available remedy under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, when a ERISA-governed managed care health insurance policy denies medical care to an insured under facts which would traditionally support punitive damages award under state law. Additionally, Appellant argues that she is entitled to a jury trial for the punitive damages claim. We hold that Appellant may not seek punitive damages or a jury trial, and therefor affirm.

This Circuit's precedent clearly does not allow for an award of punitive damages for an ERISA-based claim. In *Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 761 (11th Cir. 1996), the Court unequivocally held that "a plan beneficiary can sue to enforce her rights under the plan and under ERISA, and for equitable relief, but not for punitive or compensatory damages." Appellant relies upon the Supreme Court's decision in *Ingersoll-Rand Co. V. McClendon*, 111 S. Ct. 478 (1990). However, this Court has already considered and rejected the argument that *Ingersoll-Rand* opened the door to punitive damages claims in ERISA cases. *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 n.7 (11th Cir. 1991).

Appellant's request for a jury trial was contingent upon the punitive damages claim. Because that claim is barred, the request for a jury is moot. Moreover, our case law refuses to recognize a right to a jury trial for ERISA-based claims. *See, e.g., Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987).

Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

APPENDIX B - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED NOVEMBER 27, 1998

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 98-4127
Non-Argument Calendar

District Court Docket No. 96-1736-civ

ELLEN AUDET, as natural mother,
guardian and next best friend of
ASHLEY AUDET, a minor,

Plaintiff-Appellant,,

versus

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before COX, BIRCH and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 27, 1998
For the Court: Thomas K. Kahn, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATE: JAN 05, 1999

APPENDIX C - FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ENTERED DECEMBER 23, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-1736-CIV-MORENO

ELLEN AUDET, as natural Mother,
guardian and next best friend
of Ashley Audet,

Plaintiff,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court heard evidence at a non-jury trial on December 11 and 12, 1997 and pursuant to Fed.R.Civ. P. 52 makes the following findings of fact and separate conclusions of law.

The Plaintiff filed an action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

§§ 1001-1461, to recover benefits for treatments rendered to her minor daughter. Because the Court finds that the denial of benefits was arbitrary and capricious, judgment is entered in favor of Plaintiff in the amount of $2,415, the benefits due for the treatment between May 29 and September 1, 1995.

ISSUES

There is no dispute, and the Court finds, that Ashley Audet, a minor suffering from cystic fibrosis, was insured through her mother's employment plan, The Prudential Health Care Plan, Inc. A factual dispute does exist, however, as to whether the chest physiotherapy (CPT) was a type of custodial care that is excluded by the policy. The parties also dispute the legal question of whether the administrative finding that the exclusion applied should be judicially reviewed under a *de novo* review or a more deferential standard such as arbitrary and capricious.

FINDINGS AND CONCLUSIONS

At trial, the Court heard from the insured, Ellen Audet, and her daughter, the patient, Ashley Audet. The Plaintiff also called chest physiotherapists Nathan Winton and Sandra Conti. The Defendant called Nancy Murphy as the representative of the Plan. In addition, the Court reviewed the transcripts of the depositions of Anthony Cataldi, Karen Heins and Dr. Melvin Fletcher.

The testimony presented, as well as a review of the records admitted, undisputably show that the policy in question is an employee welfare benefit plan covered under the ERISA statute. There is also no dispute that chest

physiotherapy was administered to Ashley Audet to loosen the secretions that her cystic fibrosis causes to accumulate in her lungs. Likewise, there is no dispute as to the qualifications of Sandra Conti who provided the chest physiotherapy or as to the reasonableness of the amount of the bills ($2,415) for the treatment between May 29 and September 1, 1995.

The Defendant objects, however, to the Court considering the testimony of Nathan Winton, the owner of the chest physiotherapy service, and the testimony of Sandra Conti, the registered nurse who provided the therapy. The basis of the Defendant's objection is that the plan administrator was not provided with the information about which these two witnesses testified in court and therefore, under the arbitrary and capricious standard, the Court cannot consider their testimony.

Although ERISA does not provide a standard to review decision of a plan administrator, the Supreme Court in Firestone Tire and Rubber Co. V. Bruch, 489 U.S. 101 (1989) established a range of standards. There are three standards of review for plan interpretations: (1) *de novo,* applicable where the plan administrator is not afforded discretion; (2) arbitrary and capricious, where the plan administrator possesses discretion; and (3) heightened arbitrary and capricious where there is a conflict of interest. Marecek v. Bell South Services, Inc., 49 F3d 702 (11th Cir. 1995). Under the more deferential judicial standard of review, it is arguable that the Court could not consider the chest physiotherapists' opinion that the patient needed professional chest physiotherapy by someone other than her mother because that information had not been provided to the plan administrator.

The plan had denied the benefits to the insured under the exclusion for custodial care that may be provided by a nonprofessional. In other words, according to the Plan, Ashley Audet's cystic fibrosis was not sufficiently aggravated to require a professional therapist. The type of chest physiotherapy that needed to be performed could be done by a lay individual with minimal training. Therefore the insurer declined to award the benefits.

On the other hand, the insured's position is that it takes a professional to provide the type of chest physiotherapy that was necessary under the circumstances. Although a lay person may supplement that chest physiotherapy, and in fact Ashley's mother, a registered nurse,[1] provided such therapy for a long period of time, the patient's health condition required the services of Sandra Conti and Nathan Winton.

The Court finds credible the testimony of both Nathan Winton and Sandra Conti. The Court also finds that in order to provide the type of chest physiotherapy that was necessary to expel the secretions from the lungs, sufficient training was necessary. Although it is clear that one need not necessarily be a trained professional in order to perform the chest physiotherapy, because administering the therapy can cause discomfort to the patient, parents are frequently reluctant to perform the therapy properly, and many children resent receiving the therapy from their parents.

---

fn.1 The fact that the insured had special skills as a registered nurse should not be considered by the Plan Administration in its decision to award benefits.

In short, the Court finds that Ashley Audet's claims for chest physiotherapy treatment by a licensed professional respiratory therapist was reasonable and medically required because of her cystic fibrosis. The Court further finds that the skills necessary to perform chest physiotherapy take it outside of the custodial care exclusion indicated in the policy. The plan defines custodial care as follows:

> - Custodial care: This means that care that provides a level of routine maintenance for the purpose of meeting personal needs. This is care that can be provided by a lay person who does not have professional qualifications, skills or training. "Custodial Care" does not include care provided in conjunction with or incidental to, the provision of medically-necessary services. (Trial Exhibit No. 1, Insurance Policy, p.2.)

It is clear that if the Court were to review the plan administrator's decision to deny benefits under a *de novo* standard, the Defendant's interpretation of the policy language and the resulting denial of benefits was erroneous. However, even under the more deferential arbitrary and capricious, level of reviews required to an ERISA plan administrator's factual findings, Paramore v. Delta Air Lines, Inc., 1997 WL 74185 (11th Cir. 1997), the court finds that the plaintiff's evidence is sufficient for a conclusion that the plan's denial of benefits was an abuse of the administrator's discretion. The Court reaches this conclusion even without considering the testimony of Winton and Conti. Simply put, Prudential erred in denying the benefits under the "Custodial Care" exclusion

based on the information provided at the time to Prudential about Ashley Audet's cystic fibrosis and specifically about the necessity of professional respiratory therapy. Indeed, the Defendant had previously paid for that type of therapy.

The defendant, through Nancy Murphy, testified that the insured did not know that home care had been provided during the month of January and that Prudential found out about such care only in February. This testimony by Ms. Murphy is credible. However, Ms. Murphy also testified that no case manager had been assigned to Ashley Audet's case, and it is obvious that an insufficient number of case managers existed (only one!) to handle the 100,000 subscribers. More importantly Ms. Murphy's recommendation to Dr. Melvyn Fletcher that the benefits should be denied was made without Ms. Murphy possessing sufficient knowledge regarding chest physiotherapy or the severity of Ashley Audet's cystic fibrosis. Ms. Murphy's opinion clearly contradicted the prescription by Dr. Birriel, the patient's own physician. None of the facts alone would be sufficient to conclude that a denial of the benefits was an abuse of the discretion given the plan administrator. However, under all of the facts considered in this case, it was arbitrary and capricious to deny the professional chest physiotherapy benefits to the insured.

The Plaintiff also presented evidence and argument that Defendant, through Karen Heines, had prepared a memorandum originally recommending professional chest physiotherapy. Defendant subsequently submitted a second memorandum modifying the recommendation to one deleting the requirement of professional chest physiotherapy. The two memos were included as part of exhibit No. 2, the

administrative record of Home Care medical services, and are attached to this Order.

The Court declines to decide the significance of such modification, finding that the Plan's action, even without assigning any bad motive to the retraction of the recommendation of such memo, was sufficiently arbitrary.

Wherefore, Judgement is entered in favor of Plaintiff in the amount of benefits totaling $2,415. The Court reserves jurisdiction on any motion for attorney's fees and costs.

DONE and ORDERED this 23rd day of December, 1997 in Miami, Dade County, Florida.

/ s /
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Austin Carr, Esq.
Edward McIntyre, Esq.

Attachment #1 to Findings of Fact and Conclusions of Law

[HOME CARE MEDICAL SERVICES LETTERHEAD]

05-10-95

To: PruCare of South Florida
From: Karen Heins C.R.T.T.
Subject: RT Evaluation for Ashley Audet

Mother was seen on May 10, 1995. During discussion concerning Ashleys' treatment it became apparnt [sic] that the need for CPT treatment BID is extremely important for the well being of Ashley. The mother has been providing the AM treatments for approximately 10 minutes prior to going to work. The mother administers aerosol treatments two times daily. This treatment is supplemented by a respiratory theripsit [sic] providing CPT twice a day Monday through Friday. The mother provides the treatment (CPT) twice a day on weekends.

[HANDWRITTEN POST-IT NOTE AFFIXED TO DOCUMENT: "Per Beth - call Tony, Jr. on this."]

In our opinion the treatment provided by the mother is not vigorous enough to provide ample treatment. Our recommendation for a meaningful treatment program is as follows.

1. Treatments continue to be two times a day. One treatment provided by the mother or other family member in AM supplemented by a percussor to provide vigorous CPT with vibration. The second treatment be provided by a therapist once a day Monday through Friday.

Our concern at this time is that although treatment probably could be provided by caregivers but, if they are not supplemented by a professional treatment we may see less than agressive [sic] treatment provided which would result in future costly treatments for Ashley.

[HANDWRITTEN NOTATION AT BOTTOM OF DOCUMENT: "Wrong letter see faxed [sic] dated 5/19/95."]

Attachment #2 to Findings of Fact and Conclusions of Law

[HOME CARE MEDICAL SERVICES LETTERHEAD]

05-10-95

To: PruCare of South Florida
From: Karen Heins C.R.T.T.
Subject: RT Evaluation for Ashley Audet

Mother was seen on May 10, 1995. During discussion concerning Ashleys' treatment it became apparent that the need for CPT treatment BID is extremely important for the well being of Ashley. The mother has been providing the AM treatments for approximatly [sic] 10 minutes prior to going to work. The mother also administers aerosol treatments two times daily. This treatment is supplemented by a respiratory therapist providing CPT twice a day, Monday through Friday. The mother provides the treatment (CPT) twice a day on weekends.

In our opinion the treatment provided by the mother is not vigorous enough to provide ample treatment. Our recommendation for a meaningful treatment program is as follows.

1. Treatments continue to be two times a day. Two treatments provided by the mother or other family member supplemented by a percussor to provide vigorous CPT with vibration. Respiratory therapist should be used PRN if indicated.

[HANDWRITTEN NOTATION AT BOTTOM OF DOCUMENT: "Olga - This is the new letter from HCM - Did you get this already? Nancy"]

APPENDIX D - JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA ENTERED DECEMBER 23, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 96-1736 CIV-MORENO

ELLEN AUDET, as natural mother, guardian and next best friend of ASHLEY AUDET, a minor,

Plaintiff,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE was before the Court upon a non-jury trial held on December 11 and 12, 1997. Pursuant to the Court's separate findings of fact and conclusions of law and Fed.R.Civ.P. 54 and 58, it is

ADJUDGED that judgment is entered in favor of Plaintiff, ELLEN AUDET, as natural mother, guardian and next best friend of ASHLEY AUDET, a minor, and against

Defendants, PRUDENTIAL HEALTH CARE PLAN, INC. Defendant is liable for the amount of $2,415. Interest shall accrue on this judgment pursuant to 28 U.S.C. §1961. For which sum let execution issue. Further, it is

ADJUDGED that any pending motions are DENIED as moot. Finally, it is

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of December 1997.

/s/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:
S. Austin Carr, Esq.
W. Edward McIntyre, Esq.

(2)

98-1367

No. 98-3167

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

ELLEN AUDET AS NATURAL MOTHER, GUARDIAN AND NEXT BEST FRIEND OF ASHLEY AUDET, A MINOR,

Petitioner,

vs.

PRUDENTIAL HEALTH CARE PLAN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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W. EDWARD MCINTYRE
GREGG A. TOOMEY
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**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

18pp

QUESTION PRESENTED

Does the decision of the United States Court of Appeals for the Eleventh Circuit that punitive damages are not available under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*, create a conflict with decisions of other federal circuit courts or state courts of last resort sufficient to call for an exercise of this Court's supervisory power?

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BRIEF IN OPPOSITION

Respondent Prudential Health Care Plan, Inc. ("Prudential") believes that the Court has already decided the question presented in the Petition and that there is neither confusion nor conflict among the federal circuit courts. The few contrary pronouncements of Alabama state and federal courts are not reliable authority. Therefore, Prudential respectfully requests denial of the Petition.

STATEMENT OF THE CASE

A. The Proceedings Below:

Petitioner Ellen Audet as Natural Mother, Guardian and Next Best Friend of Ashley Audet, a Minor ("Ms. Audet"), filed a breach of contract action against Prudential in state court, alleging that Prudential failed to pay insurance benefits under her employer-sponsored health care plan ("Plan") for professional chest physiotherapy for her daughter Ashley, who suffers from cystic fibrosis. Prudential removed the action to federal court on the basis of ERISA[1] preemption and defended on the basis that the questioned bills were for custodial care excluded by the Plan.

Ms. Audet filed her Second Amended Complaint, alleging a wrongful denial of benefits under 29 U.S.C.

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[1] Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*

§ 1132(a)(1)(B)[2] from May 30, 1995 to September 15, 1995. Prudential offered to pay the claimed amount, which the parties stipulated was $2,415, but Ms. Audet rejected the offer. Instead, she twice moved to amend her pleadings to seek punitive damages and jury trial, claiming that Prudential had altered records to support its denial of coverage. Prudential opposed the motions both because they were untimely and because punitive damages are not available under ERISA. The United States District Court for the Southern District of Florida denied both motions.

Following non-jury trial, the district court entered its Findings of Fact and Conclusions of Law ("Findings"), which explain that Prudential's denial of benefits was based upon its decision that only custodial care, or care by a lay person with minimal training, was necessary when Ashley's fibrotic condition was not aggravated, and that such custodial care was excluded by the Plan. Pet. App. 9a. In ruling against Prudential on the issue, the court found that Ms. Audet's claim for professional services was reasonable and medically required by Ashley's condition. Pet. App. 10a. While the court held that Ms. Audet was entitled to the amount she claimed, it assigned no bad motive to Prudential's decision and declined to find any significance in a modified recommendation regarding Ashley's need for daily professional physiotherapy. Pet. App. 12a-15a.

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[2] "A civil action may be brought . . . by a participant . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . . "

Relying upon *Ingersoll-Rand*,[3] Ms. Audet appealed the punitive damage and jury decisions to the Eleventh Circuit, again arguing that Prudential's "falsifying medical records to justify denying care to Ashley" entitled her to claim punitive damages and go to a jury. Pet. App. 1a-3a. Prudential again responded that the alleged "falsification" was merely a revision from a first memorandum, recommending that Ashley have physiotherapy five days a week by a professional therapist, to a second memorandum, recommending as-needed professional physiotherapy. Prudential pointed out that the district court, as the factfinder, characterized the difference as a modification to which it refused to assign any bad motive.

The Eleventh Circuit affirmed the decision of the district court, explaining that it "already considered and rejected the argument that *Ingersoll-Rand* opened the door to punitive damages in ERISA cases." Pet. App. 2a.

Ms. Audet now seeks this Court's review, again arguing the Court has held that punitive damages are available under ERISA.

B. Statement of the Facts:

1. The Custodial Care Issue

This case concerned less than $3,000 in insurance coverage for *custodial*, not emergency, care. Prudential covered the cost of Ashley's chest physiotherapy whenever her condition exacerbated, and Ashley's mother, a

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[3] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

trained nurse, was providing chest physiotherapy on a daily basis when the cystic fibrosis was quiescent. No lives were at stake. There is no evidence that Ashley was ever denied treatment or that her health was ever imperiled.

While the district court found that no case manager was assigned to Ashley's case, Ms. Audet never argued that her claims suffered from lack of management. As the district court found, the parties simply differed on whether daily professional chest physiotherapy constituted custodial care excluded from coverage under the Plan. Pet. App. 10a-12a.

2. The Punitive Damages Issue

Ms. Audet's attempt to claim punitive damages is based upon two reports appended to the Findings as Attachment #1 and Attachment #2, both authored by the home health care service retained by Prudential to examine Ashley and report on her therapeutic needs. Pet. App. 12a-15a. The difference in the two Attachments is that the first recommends once-a-day professional chest physiotherapy and the second recommends professional chest physiotherapy on an as-needed basis.

After reviewing the testimony and evidence regarding the reports, their preparation, and the reasons for the difference, the district court declined to conclude that the evidence showed either falsification or alteration, as Ms. Audet urged. Instead, the court simply found a modification from the first report to the second.

REASONS FOR DENYING THE WRIT

I. The Court has held that punitive damages are not available under ERISA.

Ms. Audet's argument ignores the Court's decision in *Mertens*.[4] The *Mertens* petitioners, representing a class of former employees who participated in a retirement plan, sued the plan's actuary for breach of fiduciary duty and sought an award of compensatory damages as "appropriate equitable relief" under § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B).[5] The district court dismissed the action; the circuit court affirmed; and the case came to this Court to answer the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in the breach of a fiduciary duty imposed by ERISA.[6]

Writing for the majority, Justice Scalia noted that the Court had not yet interpreted the phrase "appropriate equitable relief"found in § 502(a)(3)(B) but had construed similar language contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), to preclude "awards for compensatory or punitive damages."[7] The Court showed no uncertainty in determining that the same meaning applied to 29 U.S.C. § 1132(a)(3)(B):

> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a

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[4] *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

[5] *Id.* at 250.

[6] *Id.* at 249-50.

[7] *Id.* at 255 (citing *U.S. v. Burke*, 504 U.S. 229, 238 (1992)).

> court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief not at all. We will not read the statute to render the modifier superfluous. . . . Regarding "equitable" relief in § 502(a)(3) to mean "all relief available for breach of trust at common law" would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between "equitable" and "remedial" relief in the very same section of ERISA. . . . [8]

In the end, the majority held that only traditional equitable remedies such as injunction, mandamus, and restitution, but not money damages, were available to ERISA plaintiffs.[9]

Writing in dissent, Justice White asserted that, since ERISA "abounds with the language and terminology of trust law," the statutory phrase "must be construed against the background of the common law of trusts."[10] Since both courts of equity and law had jurisdiction over a trust beneficiary's claims, the dissent stated that it was appropriate to look to the traditional equitable remedies afforded a trust beneficiary. This, the dissent said, included "a monetary award to make the victims of the

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[8] *Id.* at 257-59.

[9] *Id.* at 260.

[10] *Id.* at 264 (White, J., dissenting) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989)).

breach whole."[11] Even though the dissent disagreed with the majority on whether some form of compensatory award was available under ERISA, it agreed that punitive damages were not available:

> The fact of the matter is that not all forms of relief were available in the common-law courts of equity for a breach of trust. Although the equity courts could award monetary relief to make the victim of a breach of trust whole, extracompensatory forms of relief, such as punitive damages, were not available. As this Court has long recognized, courts of equity would not – absent some express statutory authorization – enforce penalties or award punitive damages. . . . As Justice Kennedy has observed, this limitation on equitable relief applied in the trust context as well, where plaintiffs could recover compensatory monetary relief for a breach of trust, but not punitive or exemplary damages.[12]

Although the *Mertens* majority and dissent differed on the availability of compensatory damages under ERISA, they agreed that punitive damages are not available. Because the Court has already answered the question Ms. Audet asks, the Petition should be denied.

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[11] *Id.* at 266 (White, J., dissenting).

[12] *Id.* at 270 (White, J., dissenting).

II. There is no conflict among the federal circuit courts or with any valid decision of the highest court of a state.

Ms. Audet claims the decision of the Eleventh Circuit conflicts with the decision of this Court in *Ingersoll-Rand*,[13] and the pronouncement of the Supreme Court of Alabama in *Weems*.[14] As to *Ingersoll-Rand*, she is incorrect. And, although the Eleventh Circuit's decision may facially conflict with *Weems*, *Weems* and its Alabama companions are not only isolated in a sea of correctly-decided cases, the *Weems* pronouncement on the ERISA punitive damage issue was either dicta or the court was without jurisdiction to decide the issue.

In *Ingersoll-Rand*, the Court addressed a wrongful discharge suit brought by an ex-employee who claimed his discharge was motivated by his employer's desire to avoid contributing to his pension fund.[15] The ex-employee sought compensatory and punitive damages. The issue before the Court was whether the relief sought by the ex-employee was pre-empted by ERISA. In finding that the suit was pre-empted, the Court noted: "It is clear that the relief requested here is well within the power of federal courts to provide."[16] The United States District Court for the Northern District of Alabama seized upon

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[13] *Id.* at 133.

[14] *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So. 2d 905 (Ala. 1995).

[15] *Id.* at 136.

[16] *Id.* at 145.

this sentence as allowing any form of extra-contractual damages:

> In Ingersoll-Rand the Supreme Court has now clearly answered the Eleventh Circuit's prayer by giving it the "green light" to fashion ERISA remedies beyond the mere enforcement of claims for unpaid benefits, even though a federally fashioned remedy may bear a striking similarity to some "preempted" state or common law remedy. According to Ingersoll-Rand, a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extra-contractual, even punitive, damages, that is, if the facts call for such a remedy.[17]

The state courts of Alabama followed this misinterpretation of *Ingersoll-Rand* in a series of cases holding that state and federal courts are authorized to impose extra-contractual and punitive damages in ERISA cases.[18]

Ms. Audet focuses on *Weems* to argue that *Ingersoll-Rand* established that punitive damages are available under ERISA. Prudential's response is threefold. First, the language in *Ingersoll-Rand* speaks of relief, not remedies

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[17] *Blue Cross and Blue Shield of Alabama v. Lewis*, 753 F. Supp. 345, 347 (N.D. Ala. 1990).

[18] *See Ex parte Metropolitan Life Ins. Co.*, 679 So. 2d 686, 688-89 (Ala. 1996); *Weems*, 663 So. 2d at 905; *Haywood v. Russell Corp.*, 584 So. 2d 1291, 1296 (Ala. 1991). One of the *Weems* dissenters later took the incorrect position in *Metropolitan Life* that the Court's denial of certiorari in *Weems* was an indication that punitive damages are available under ERISA, *Metropolitan Life* at 689 (Houston, J. concurring); the denial of a petition for certiorari "imports no expression of opinion upon the merits of the case." *U.S. v. Carver*, 260 U.S. 482, 490 (1923).

such as compensatory and punitive damages. Second, whatever precedential value the language in *Ingersoll-Rand* once had was supplanted by this Court's decision in *Mertens*, which clarifies that compensatory and punitive damages are not available remedies under ERISA. Third, *Weems* does not present a conflict with the decision of the Eleventh Circuit in this case over which this Court should exercise jurisdiction for two reasons.

In *Weems*, plan participants sued an employer and insurer under state law and ERISA. The participants' pleadings showed that their ERISA claim was under § 1132(a)(1)(B), but they also sought compensatory and punitive damages alleging that the employer had allowed their ERISA plan to lapse. One of two analyses of *Weems* must be accurate. Either the *Weems* court had jurisdiction because the only ERISA claim was under § 1132(a)(1)(B), in which case any language regarding the availability of compensatory and punitive damages under 29 U.S.C. § 1132(a)(3) is nothing more than dicta. Or, alternatively, the *Weems* court improperly asserted jurisdiction over a claim under § 1132(a)(3), because exclusive jurisdiction over § 1132(a)(3) claims is vested in federal courts. 29 U.S.C. § 1132(e). In either event, *Weems* is not a "decision" upon which Ms. Audet can validly rely to argue that conflict exists with the Eleventh Circuit's decision here. S.Ct.R. 10(a).

Ms. Audet also claims conflict among the federal circuit courts. The cases upon which she relies, however, all expressly recognize, as did the Eleventh Circuit here,

that punitive damages are not available under ERISA.[19] Again, there is no conflict.

III. Neither *Mertens* nor the decisions of the federal circuit courts conflict with Congressional intent.

To support her argument that the decisions of the federal circuit courts conflict with Congressional intent, Ms. Audet cites a 1988 Report from the House of Representatives Education and Labor Committee.[20] As the Eleventh Circuit recognized in *McRae*, the Report "carries

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[19] *See Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196, 199 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1512 (1998) (recognizing that the Supreme Court has "adamantly ruled that ERISA's express remedies are a signal to courts not to create additional remedies of their own."); *Hemelt v. U.S.*, 122 F.3d 204, 207 (4th Cir. 1997) (holding that ERISA does not allow claims for compensatory or punitive damages); *Zimmerman v. Sloss Equipment, Inc.*, 72 F.3d 822, 828 (10th Cir. 1995) ("We have previously held that punitive damages are not available in an ERISA action."); *Landwehr v. DuPree*, 72 F.3d 726, 735 (9th Cir. 1995) ("ERISA plaintiffs may only obtain equitable relief such as restitution, and not compensatory or punitive damages, from a party in interest."); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29, 31 (5th Cir.), *cert. denied*, 510 U.S. 816 (1993) ("Had Congress intended to develop ERISA remedies additional to the ones it specifically crafted, it has had ample opportunity to enact such legislation."); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 286 (2d Cir. 1992) (holding that neither § 502(a)(2) nor § 502(a)(3) allows punitive damage awards); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 506 U.S. 818 (1992) ("We are not rash enough to believe that the [*Ingersoll-Rand*] Court intended to overrule settled law in most of the circuits, as well as narrowly limit – if not overrule – its own decision in *Russell* in such an off-hand manner.").

[20] H.R. Rep. No. 101-247, at 98 (1989).

slight weight in this case."[21] A Committee statement does not express Congressional intent – just the opinion of a Committee nearly 15 years after ERISA was enacted.

As this Court noted in *Mertens*, the "notion that concern about punitive damages motivated Congress is a classic example of projecting current attitudes upon the helpless past."[22] In 1974, when ERISA was enacted, the availability of punitive damages was not an issue. By 1988, when the Committee Report was promulgated, there were "clear precedents" from this Court and the federal circuit courts that punitive damages were not available under ERISA.[23] Faced with such clear precedents, Congress could easily have amended ERISA to clarify that punitive damages were available to ERISA plaintiffs – if that were Congressional intent. That Congress enacted no such amendment in response to the well-developed case law construing ERISA and the 1988 Committee report leaves little doubt that this Court and the federal circuit courts have correctly construed Congressional intent.

IV. Ms. Audet's remaining arguments are for Congress and not this Court.

Ms. Audet's final arguments are correctly directed to her Congressional representatives and not to this Court. If public policy, public outcry, and rampant abuses by

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[21] *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 822-23 (11th Cir. 1991).

[22] *Id.* at 257 n. 7.

[23] *McRae*, 920 F.2d at 823.

ERISA insurers call for response, as she contends, then that response is for Congress to provide. The Seventh Circuit, which authored *Herdrich v. Pegram*,[24] the case upon which Ms. Audet relies for her "consumer outcry" argument, recognized as much.[25] To the extent Ms. Audet claims that the facts of this case support an award of punitive damages, the district court, as the trier of fact, disagreed that Prudential even exhibited a bad motive. Pet. App. 12a.

The only question presented by the Petition is whether punitive damages are available under ERISA as it exists today. This Court has correctly answered the question in *Mertens*. Long before *Marbury v. Madison*,[26] this Court established that it is the province of the judiciary to construe the laws enacted by Congress, but not to determine what the law should be. The Court most recently clarified that division of power in *Mertens*: "We will not attempt to adjust the balance between . . . competing goals that the text adopted by Congress has struck."[27]

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[24] 154 F.3d 362 (7th Cir. 1997).

[25] *Harsch*, 956 F.2d at 660.

[26] 5 U.S. (1 Cranch) 137 (1803).

[27] *Id.* at 263.

CONCLUSION

There is no reason for this Court to exercise its supervisory jurisdiction in this case. The question presented was authoritatively answered in *Mertens*, the federal circuit courts are unified in their rejection of ERISA punitive damage claims, and the few incorrectly-decided Alabama cases are insufficient to trigger conflict jurisdiction. Any further evolution of ERISA is for Congress.

Respectfully submitted,

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